

EXHIBIT E

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION
ORACLE AMERICA, INC.,
Plaintiff,
vs. Case No. 3:10-cv-03561-WHA
GOOGLE, INC.,
Defendant.

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PURSUANT TO THE PROTECTIVE ORDER
VIDEO DEPOSITION OF JAMES MALACKOWSKI
San Francisco, California
Wednesday, March 17, 2016
Volume I

REPORTED BY:
REBECCA L. ROMANO, RPR, CSR No. 12546
JOB NO. 2265299
PAGES 1 - 385

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<p style="text-align: right;">Page 2</p> <p>1 UNITED STATES DISTRICT COURT</p> <p>2 NORTHERN DISTRICT OF CALIFORNIA</p> <p>3 SAN FRANCISCO DIVISION</p> <p>4 ORACLE AMERICA, INC.,</p> <p>5 Plaintiff,</p> <p>6 vs. Case No. 3:10-cv-03561-WHA</p> <p>7 GOOGLE, INC.,</p> <p>8 Defendant.</p> <hr/> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13 DEPOSITION OF JAMES MALACKOWSKI,</p> <p>14 taken on behalf of the Defendant, at</p> <p>15 633 Battery Street, San Francisco, California,</p> <p>16 commencing at 8:35 a.m., Wednesday,</p> <p>17 March 16, 2016, before Rebecca L. Romano,</p> <p>18 Certified Shorthand Reporter No. 12546</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1 APPEARANCES OF COUNSEL (cont'd)</p> <p>2</p> <p>3 For the Defendant:</p> <p>4 KEKER & VAN NEST LLP</p> <p>5 BY: DANIEL PURCELL</p> <p>6 BY: MAYA KARWANDE</p> <p>7 Attorneys at Law</p> <p>8 633 Battery Street</p> <p>9 San Francisco, California 94111</p> <p>10 (415) 773-6697</p> <p>11 dpurcell@kvn.com</p> <p>12 mkarwande@kvn.com</p> <p>13</p> <p>14 For James Kearn:</p> <p>15 FARELLA BRUAN + MARTEL LLP</p> <p>16 BY: JOHN L. COOPER</p> <p>17 Attorney at Law</p> <p>18 Russ Building</p> <p>19 235 Montgomery Street</p> <p>20 San Francisco, California 94104</p> <p>21 (415) 954-4400</p> <p>22 jcooper@fbm.com</p> <p>23</p> <p>24</p> <p>25 /////</p>
<p style="text-align: right;">Page 3</p> <p>1 APPEARANCES OF COUNSEL</p> <p>2</p> <p>3 For the Plaintiff:</p> <p>4 ORRICK, HERRINGTON & SUTCLIFFE, LLP</p> <p>5 BY: ANNETTE L. HURST</p> <p>6 BY: ROBERT KEELE</p> <p>7 Attorneys at Law</p> <p>8 The Orrick Building</p> <p>9 405 Howard Street</p> <p>10 San Francisco, California 94105-2669</p> <p>11 (415) 773-4585</p> <p>12 ahurst@orrick.com</p> <p>13 rkeele@orrick.com</p> <p>14 and</p> <p>15 BY: AYANNA LEWIS-GRUSS</p> <p>16 Attorney at Law</p> <p>17 51 West 52nd Street</p> <p>18 New York, New York 10019-6142</p> <p>19 (212) 506-5000</p> <p>20 alewisgruss@orrick.com</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25 /////</p>	<p style="text-align: right;">Page 5</p> <p>1 APPEARANCES (cont'd)</p> <p>2</p> <p>3 ALSO PRESENT:</p> <p>4 James Kearn</p> <p>5 Brandon Miller, Videographer</p> <p>6 Deborah Miller, In-House Counsel Oracle</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25 /////</p>

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<p style="text-align: right;">Page 6</p> <p>1 INDEX</p> <p>2 DEPONENT EXAMINATION</p> <p>3 JAMES MALACKOWSKI PAGE</p> <p>4 VOLUME I</p> <p>5 BY MR. PURCELL 10, 382</p> <p>6 BY MR. COOPER 305</p> <p>7 BY MS. HURST 379</p> <p>8</p> <p>9</p> <p>10</p> <p>11 EXHIBITS (cont'd)</p> <p>12 NUMBER PAGE</p> <p>13 DESCRIPTION</p> <p>14 Exhibit 1576 Expert Report of James</p> <p>15 E. Malackowski, 1/8/2016; 51</p> <p>16</p> <p>17 Exhibit 1577 Responsive Expert Report</p> <p>18 of James E. Malackowski,</p> <p>19 2/29/2016; 129</p> <p>20</p> <p>21 Exhibit 1578 Strategic Forecast,</p> <p>22 OAGOOGL00100164541,</p> <p>23 7 Pages; 262</p> <p>24</p> <p>25 /////</p>	<p style="text-align: right;">Page 8</p> <p>1 San Francisco, California; Wednesday, March 16, 2016</p> <p>2 8:35 a.m.</p> <p>3 ---o0o---</p> <p>4 THE VIDEOGRAPHER: Good morning. We are</p> <p>5 on the record at 8:35 a.m. on March 16th, 2016.</p> <p>6 And this is the video-recorded deposition of</p> <p>7 James Malackowski.</p> <p>8 My name is Brandon Miller, here with our</p> <p>9 court reporter, Rebecca Romano. We are here from</p> <p>10 Veritext Legal Solutions.</p> <p>11 This deposition is being held at</p> <p>12 633 Battery Street, San Francisco, California.</p> <p>13 The caption of this case is</p> <p>14 Oracle America, Inc., versus Google, Inc.,</p> <p>15 Case No. CV 10-203561-WHA [sic].</p> <p>16 Please note that audio and video</p> <p>17 recording will take place unless all parties agree</p> <p>18 to go off the record. Microphones are sensitive,</p> <p>19 may pick up whispers, private conversations, and</p> <p>20 cellular interference.</p> <p>21 I am not related to any party in this</p> <p>22 action, nor am I financially interested in the</p> <p>23 outcome in any way.</p> <p>24 At this time, will counsel please</p> <p>25 introduce themselves.</p>
<p style="text-align: right;">Page 7</p> <p>1 EXHIBITS (cont'd)</p> <p>2 NUMBER PAGE</p> <p>3 DESCRIPTION</p> <p>4 Exhibit 1579 PowerPoint - Sun, Java in</p> <p>5 Wireless Business Review,</p> <p>6 10/21/2008,</p> <p>7 OAGOOGL0000142142 -</p> <p>8 OAGOOGL0000142176. 267</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25 /////</p>	<p style="text-align: right;">Page 9</p> <p>1 MR. PURCELL: Dan Purcell,</p> <p>2 Kecker & Van Nest, representing Google.</p> <p>3 MS. KARWANDE: Maya Karwande,</p> <p>4 Kecker & Van Nest, also representing Google.</p> <p>5 MS. MILLER: Deborah Miller, in-house at</p> <p>6 Oracle.</p> <p>7 MR. COOPER: John Cooper of</p> <p>8 Farella Braun + Martel. I'm the -- I'm</p> <p>9 representing Judge -- or I'm -- Jim Kearl, the</p> <p>10 Judge's Rule 706 expert, Dr. Kearl. And he's</p> <p>11 sitting beside me.</p> <p>12 MS. HURST: Annette Hurst of,</p> <p>13 Orrick Herrington & Sutcliffe for Oracle America, along</p> <p>14 with my colleagues, Ayanna Lewis-Gruss and Robert Keele.</p> <p>15 THE VIDEOGRAPHER: You may now swear in</p> <p>16 the witness.</p> <p>17 THE REPORTER: If you could raise your right</p> <p>18 hand for me, please.</p> <p>19 THE DEPONENT: (Complies.)</p> <p>20 THE REPORTER: You do solemnly state,</p> <p>21 under penalty of perjury, that the testimony you</p> <p>22 are about to give in this deposition, shall be the</p> <p>23 truth, the whole truth and nothing but the truth?</p> <p>24 THE DEPONENT: I do.</p> <p>25 /////</p>

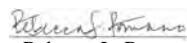
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<p style="text-align: right;">Page 106</p> <p>1 period in which they were acquired by Sun.</p> <p>2 Q. What are the dates of that period?</p> <p>3 A. I honestly don't recall from memory.</p> <p>4 It's referenced within my rebuttal report. I don't</p> <p>5 remember if it was 2009 or '10, and I don't want to</p> <p>6 speculate.</p> <p>7 Q. SavaJe was never able to achieve any</p> <p>8 partnerships with any OEM handset manufacturers,</p> <p>9 were they?</p> <p>10 A. Well, ultimately, no. SavaJe was</p> <p>11 acquired by Sun, and then ultimately shut down. It</p> <p>12 was shut down subsequent to the launch of Android.</p> <p>13 And in my opinion, it was shut down in part because</p> <p>14 of the launch of Android.</p> <p>15 Q. You say "in part because of the launch of</p> <p>16 Android," were there other reasons why SavaJe was</p> <p>17 shut down by Sun?</p> <p>18 A. Not that I'm aware of.</p> <p>19 Q. Sun didn't shut down SavaJe because it</p> <p>20 wasn't able to make a -- a commercially viable</p> <p>21 mobile phone product?</p> <p>22 A. That's not true. I mean, my</p> <p>23 understanding is, even prior to the acquisition by</p> <p>24 Sun, SavaJe -- SavaJe had a working phone, that</p> <p>25 they were named product of the year at the time,</p>	<p style="text-align: right;">Page 108</p> <p>1 point to showing that Sun shut SavaJe down because</p> <p>2 of Android?</p> <p>3 A. I believe there's explicit discussion of</p> <p>4 that within my second report that includes</p> <p>5 reference to discussions with OEM partners, where</p> <p>6 OEM partners describe their opportunity with</p> <p>7 Android as being more attractive. I would defer to</p> <p>8 that report. I don't recall specific documents as</p> <p>9 I sit here.</p> <p>10 Q. Getting back to the mobile window, you --</p> <p>11 you mentioned Nokia.</p> <p>12 Nokia had never been able to develop a</p> <p>13 commercially acceptable smartphone product, have</p> <p>14 they?</p> <p>15 A. Well, what's a smartphone? So there is a</p> <p>16 continuum that exists between feature phones and</p> <p>17 smartphones. At the end or the bookends of the</p> <p>18 continuum, I think it's very clear that a feature</p> <p>19 phone is different than a smartphone. But along</p> <p>20 that continuum, I don't think it is fair to say</p> <p>21 that Android -- I mean that Nokia never had a</p> <p>22 product that could fairly be categorized as a</p> <p>23 smartphone. I would have to go back to look at</p> <p>24 their specific products and what they were</p> <p>25 producing at the time. And even if it wasn't</p>
<p style="text-align: right;">Page 107</p> <p>1 that they had sold on the marketplace tens of</p> <p>2 thousands of units through Tier 2 Telco companies.</p> <p>3 So I don't think it's fair to say they didn't have</p> <p>4 a working product.</p> <p>5 Q. They were named product of the year by --</p> <p>6 by who?</p> <p>7 A. It was one of the shows that they</p> <p>8 attended in the period right before -- right when</p> <p>9 they launched. I don't recall the -- the trade</p> <p>10 show.</p> <p>11 Q. So Sun had a working -- strike that.</p> <p>12 SavaJe had a working phone product that</p> <p>13 was commercially viable, and yet Sun chose to shut</p> <p>14 it down?</p> <p>15 A. Yes. In response to the launch of</p> <p>16 Android and, in particular, the competitive dynamic</p> <p>17 that was created as a launch of the Android, I</p> <p>18 think as summarized in my report, and -- and we're</p> <p>19 talking about a very complex process in a very</p> <p>20 short way, that Sun didn't feel that it could not</p> <p>21 compete with its own technology wherein its own</p> <p>22 technology was given away for free or even</p> <p>23 subsidized through the traffic acquisition program</p> <p>24 of Google.</p> <p>25 Q. What contemporaneous records of Sun can</p>	<p style="text-align: right;">Page 109</p> <p>1 commercially launched, it is my understanding that</p> <p>2 they clearly were using, I believe, Java SE at the</p> <p>3 time in order to contemplate such.</p> <p>4 Q. What's your basis for saying that Nokia</p> <p>5 was using Java SE?</p> <p>6 A. That's just my recollection in response</p> <p>7 to your question. I -- I don't recall the specific</p> <p>8 documents.</p> <p>9 Q. Are you sure there are any?</p> <p>10 A. Well, if -- if my recollection is right,</p> <p>11 I didn't make it up, so I would believe there are,</p> <p>12 yes.</p> <p>13 Q. They would be cited in your report, I</p> <p>14 would assume.</p> <p>15 A. I don't know that to be the case. I</p> <p>16 don't believe I discussed at great length whether</p> <p>17 or not Nokia had a smartphone in part, because that</p> <p>18 is only in relevant if you believed that there were</p> <p>19 some sort of counterfactual world that needed to be</p> <p>20 taken into account, which clearly there is not. So</p> <p>21 I don't think it's particularly relevant to my</p> <p>22 opinions.</p> <p>23 Q. All right. So what would Google have had</p> <p>24 to deliver to market within the mobile window we</p> <p>25 described, from 2005 to 2010, in order to assure</p>

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<p style="text-align: right;">Page 110</p> <p>1 the success of Android?</p> <p>2 A. A Java-based phone, hopefully</p> <p>3 appropriately licensed.</p> <p>4 Q. It would have to be a Java-based system?</p> <p>5 A. In my opinion, in order to be successful</p> <p>6 in that window of opportunity, as confirmed by what</p> <p>7 they actually did, the actual events, the revealed</p> <p>8 preference, so to speak; and as confirmed by the</p> <p>9 substantial promotion of Java to the OEM community,</p> <p>10 as detailed in the last exhibit, or appendix of my</p> <p>11 second report; and as confirmed by the testimony in</p> <p>12 this record which cited, which all points to the</p> <p>13 fact that the OEMs required Java, yes, it is my</p> <p>14 opinion that there was not an alternative platform</p> <p>15 that would have allowed them to penetrate the</p> <p>16 window and reach commercial success.</p> <p>17 Q. Other than predictive Google documents</p> <p>18 before Android was released, what's your basis for</p> <p>19 saying that OEMs required Java?</p> <p>20 A. I believe there are -- there's deposition</p> <p>21 testimony confirming that that is, in fact, the</p> <p>22 case, and testimony confirming that that was part</p> <p>23 of the reason Google determined and took the action</p> <p>24 that they did, supported by the fact that that's</p> <p>25 what they were promoting to the OEMs.</p>	<p style="text-align: right;">Page 112</p> <p>1 know they desired them because they were willing to</p> <p>2 pay millions of dollars, I think I cited a Samsung</p> <p>3 example where they were paid \$44 million over a</p> <p>4 discrete period of time -- and then they quickly</p> <p>5 transitioned to Android because they would pay</p> <p>6 nothing.</p> <p>7 So to me, that speaks volumes, actions</p> <p>8 speak louder than words, that the OEMs demanded a</p> <p>9 Java-base platform.</p> <p>10 Q. Now, why does that suggest that OEMs</p> <p>11 demanded Java as opposed to being willing to use an</p> <p>12 open source C++ platform?</p> <p>13 A. Because they were willing to pay with</p> <p>14 significant dollars in order to obtain Java</p> <p>15 pre Android under appropriate licensing. So if it</p> <p>16 were true that they would be indifferent, and if it</p> <p>17 were true that Dr. Leonard's analysis of the cost</p> <p>18 of moving to C++ is accurate, why would they -- why</p> <p>19 would Samsung pay \$44 million to Java when they</p> <p>20 could just go get C++ for substantially nothing.</p> <p>21 Q. Well, because nobody had developed a</p> <p>22 C++ platform yet. I mean, you -- you can't say,</p> <p>23 can you, that that proves anything, that Samsung</p> <p>24 was willing to pay \$44 million to license Java when</p> <p>25 there was no open source C++ or Java alternative</p>
<p style="text-align: right;">Page 111</p> <p>1 Q. What evidence do you have that Google was</p> <p>2 actually right about their predictions that OEMs</p> <p>3 required Java?</p> <p>4 A. Well, I think the best evidence is that</p> <p>5 the Java-based Android platform exceeded everyone's</p> <p>6 expectations. If you look to expectations or</p> <p>7 benchmark of expectations is, for example, by the</p> <p>8 arms' length negotiated incentives that were in --</p> <p>9 in the Android acquisition documents negotiated by</p> <p>10 Andy Rubin, versus what actually happened once</p> <p>11 Android hit the market and reached escape velocity,</p> <p>12 I think the evidence all points to the fact that</p> <p>13 Google was right, that it was the right choice in</p> <p>14 order to penetrate the market and capture the</p> <p>15 window of opportunity.</p> <p>16 Q. Are you aware of any statement from an</p> <p>17 OEM confirming that OEMs required Java?</p> <p>18 A. I can't tell you that I recall statements</p> <p>19 that explicitly contain those words, but what I do</p> <p>20 cite in my report is, OEMs who were paying millions</p> <p>21 of dollars to access Java through appropriate</p> <p>22 licensing, who made the decision to depart from</p> <p>23 that, only to go to Android, which was also Java</p> <p>24 based, and the explanation being that they were</p> <p>25 getting the same benefits they desired -- and we</p>	<p style="text-align: right;">Page 113</p> <p>1 being offered by anyone, can you?</p> <p>2 A. At some point now we are talking about</p> <p>3 more of a technical discussion and, for example,</p> <p>4 whether Microsoft an alternative that was available</p> <p>5 to them, Microsoft's platform.</p> <p>6 All I can tell you is that, one, we're</p> <p>7 in, again, counterfactual discussions which are not</p> <p>8 applicable. So there isn't extensive discussions</p> <p>9 with this in my report because, I mean, I can't say</p> <p>10 over and over again, to me the standard for</p> <p>11 calculating damages of profit disgorgement in a</p> <p>12 copyright case do not permit this discussion of a</p> <p>13 counterfactual world.</p> <p>14 But being that said, I think these are</p> <p>15 largely technical discussions. And so if you force</p> <p>16 the discussion of the hypothetical, I would</p> <p>17 encourage you to ask those questions of the</p> <p>18 technical experts.</p> <p>19 Q. Are you offering an opinion on the legal</p> <p>20 standard for copyright infringement damages?</p> <p>21 A. So that's a little bit of a nuance</p> <p>22 question. So the analogy that I use, because I'm</p> <p>23 asked that frequently in a patent case, I refer to</p> <p>24 the Panduit factors and the Georgia-Pacific factors</p> <p>25 in virtually every case. That's a legal standard.</p>

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<p style="text-align: right;">Page 382</p> <p>1 take into account the unexpected events of the</p> <p>2 marketplace, such as the development of the -- of</p> <p>3 the consumer demand for smartphones, by way of</p> <p>4 example, or, frankly, just the total overall demand</p> <p>5 for smartphones at that time.</p> <p>6 MS. HURST: No further questions.</p> <p>7 FURTHER EXAMINATION</p> <p>8 BY MR. PURCELL:</p> <p>9 Q. Mr. Malackowski, really briefly, during</p> <p>10 Mr. Cooper's questioning regarding Samsung phones</p> <p>11 you referred to Java ME as an operating system.</p> <p>12 Do you remember that?</p> <p>13 A. I -- I do not remember that reference.</p> <p>14 Q. Java ME is not an operating system,</p> <p>15 correct?</p> <p>16 A. I would not describe it as such.</p> <p>17 Q. It's an applications platform, correct?</p> <p>18 A. Better questions for the technical</p> <p>19 expert. I don't believe I use either term in my</p> <p>20 report. I don't have an opinion.</p> <p>21 Q. And, likewise, Java SE is not an</p> <p>22 operating system either, correct?</p> <p>23 A. Same answer.</p> <p>24 MR. PURCELL: All right. That's all.</p> <p>25 MR. COOPER: Okay. Let's -- let's</p>	<p style="text-align: right;">Page 384</p> <p>1 I, JAMES MALACKOWSKI, do hereby declare under</p> <p>2 penalty of perjury that I have read the foregoing</p> <p>3 transcript; that I have made any corrections as appear</p> <p>4 notes; that my testimony as contained herein, as</p> <p>5 corrected, is true and correct.</p> <p>6 Executed this ____ day of _____,</p> <p>7 2016, at _____.</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p style="text-align: center;">_____ JAMES MALACKOWSKI</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 383</p> <p>1 clarify that you, through counsel, are going to</p> <p>2 send us, what, two items?</p> <p>3 MS. HURST: Yeah. Let's just -- do you</p> <p>4 want to do it on or off the record?</p> <p>5 MR. COOPER: I don't care.</p> <p>6 MS. HURST: Let's go off the record and</p> <p>7 then we'll confirm what it is that we're sending</p> <p>8 you.</p> <p>9 THE VIDEOGRAPHER: This concludes today's</p> <p>10 deposition of James Malackowski. The total number</p> <p>11 of media used is seven. We're going off the record</p> <p>12 at 6:31 p.m.</p> <p>13 (TIME NOTED: 6:31 p.m.)</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18 ---o0o---</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 385</p> <p>1 I, Rebecca L. Romano, a Certified Shorthand</p> <p>2 Reporter of the State of California, do hereby certify:</p> <p>3 That the foregoing proceedings were taken before me</p> <p>4 at the time and place herein set forth; that any</p> <p>5 witnesses in the foregoing proceedings, prior to</p> <p>6 testifying, were administered an oath; that a record of</p> <p>7 the proceedings was made by me using machine shorthand</p> <p>8 which was thereafter transcribed under my direction;</p> <p>9 that the foregoing transcript is true record of the</p> <p>10 testimony given.</p> <p>11 Further, that if the foregoing pertains to the</p> <p>12 original transcript of a deposition in a Federal Case,</p> <p>13 before completion of the proceedings, review of the</p> <p>14 transcript [] was [X] was not requested.</p> <p>15 I further certify I am neither financially</p> <p>16 interested in the action nor a relative or employee of</p> <p>17 any attorney or any party to this action.</p> <p>18 IN WITNESS WHEREOF, I have this date subscribed my</p> <p>19 name.</p> <p>20</p> <p>21 Dated: March 17, 2016</p> <p>22</p> <p>23</p> <p style="text-align: center;"> Rebecca L. Romano, RPR, CSR. No 12546</p> <p>24</p> <p>25</p>